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## Lockdown, Law & the Whirligig of Jurisprudence: The Return of a Realist

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## Chapter 12

# Lockdown, Law & the Whirligig of Jurisprudence: The Return of a Realist

David Dennis and Simon Lee

### Abstract

This chapter seeks to apply the lessons which can be learned from Karl Llewellyn's jurisprudence to the Covid-19 pandemic, which has had a widespread effect on populations not only in the UK and the European Union but worldwide. It considers some of the jurisprudential aspects which arise from the attempts to deal with the medical and public health crisis through the use of legal regulations in the UK context. The questions to which the use of legal regulations give rise are many and wide in nature. They extend in scope to matters beyond what might be regarded as the notion of the strictly 'legal' in its narrower sense. This chapter argues that these jurisprudential aspects can most usefully be analysed through adopting the framework of Llewellyn's 'law-jobs' theory, and as part of that theory, the single institution of what he described as 'law-government'. The statement in *The Bramble Bush* that 'What ... officials do about disputes ... is the law itself' has an important bearing on both. The continuing relevance and importance of the 'law-jobs' theory and the 'law-government' institution, we argue, deserve a resurgence in interest in the far-reaching scope and applicability of Llewellyn's jurisprudence and a greater recognition of its significance than is commonly displayed today.

### 1. Introduction

The Open University was conceived and born in the 1960s. Jurisprudence, of course, has a far longer lineage. Socrates, for example, was articulating the reasons why there might be a moral obligation to obey an unjust law in 399 BC. Sir Stephen Sedley referred in 2018 to "the whirligig of time"<sup>1</sup> in comparing the time spans needed to achieve various changes in ideologies in the sphere of human rights. Beyond the sphere of human rights, the image of the whirligig (or spinning toy) is even more appropriately invoked in the sphere of jurisprudence<sup>2</sup> before and after the opening of the Open University.

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<sup>1</sup> 'There is a striking and perhaps significant contrast between, on the one hand, the centuries which it took to make the transition from largely self-serving ideas and ideologies which underpinned slavery and race discrimination to the modern unacceptability of both, and on the other hand, the brief span of years from the Stonewall raids and riots of 1969 to the decriminalisation of homosexual acts and the legal recognition of same-sex marriages ... The only thing that that can be treated as certain is that human rights will not stay where they now are. The whirligig of time will see to that. Whether they will advance or retreat, and what will cause them to do so, we cannot say; but one has to hope in the present climate that it is not Caliban, rather than Malvolio who is about to be revenged upon the whole pack of us.' (Sir Stephen Sedley, *Law and The Whirligig of Time of Time* (Oxford, Bloomsbury Publishing, 2018) 50).

<sup>2</sup> We use the term 'jurisprudence' here in its wider sense and one which is not confined or restricted in meaning or use to 'legal philosophy', including the particular branch of 'analytical legal philosophy' as exemplified in the works of jurists such as HLA Hart and Joseph Raz. Such a restriction would exclude the adoption within a jurisprudential context of other important alternative perspectives, such as the historical, sociological, and contextual socio-legal perspectives, all of which afford valuable jurisprudential insights. See Twining's alternative way of viewing

This whirligig of jurisprudence has seen theories come and go and return in cycles. The 1960s, for example, had seen jurisprudence enjoying a resurgence. The most famous British legal theorist of the twentieth century, HLA Hart, published *The Concept of Law*<sup>3</sup> in 1961, which provided one of the most significant spring-boards of jurisprudential debate. One of the leading American legal thinkers of that century, Karl Llewellyn,<sup>4</sup> died a year later, in 1962, just as his *Jurisprudence: Realism in Theory and Practice*,<sup>5</sup> a collection of papers previously published between 1928 and 1960 in relation to the broader aspects of Legal Realism, was about to be published. One year before the Open University received its Royal Charter in 1969, the American Ronald Dworkin was appointed to the Chair of Jurisprudence at Oxford in succession to Hart.

Open University students began to graduate in the 1970s but not in Law. Jurisprudence continued to look backwards and forwards to good effect. In 1973, the twentieth century's most famous Continental legal philosopher, Hans Kelsen, died while William Twining published *Karl Llewellyn and the Realist Movement*,<sup>6</sup> heralding the beginning of a period in which serious consideration began to be devoted to a re-assessment of the significance of Karl Llewellyn within American Legal Realism, not least through the Law in Context movement, in which Twining has played such a significant role. Like Kelsen, Twining's writing on law and jurisprudence has spanned half a century and that of Llewellyn, Hart and Dworkin over 40 years.

In the first fifty years of the Open University, many other theoretical approaches to law have come to the fore, such as Feminist Legal Theory, Critical Legal Studies, and Critical Race Theory, promoting diverse perspectives on the law from previously marginalized standpoints. Over a larger span of time, other legal theories have seemingly risen and fallen. Thus, at the end of the nineteenth century and the beginning of the twentieth century, Natural Law theory appeared to have been eclipsed by Austinian Legal Positivism. Then the rise of totalitarian regimes in Germany, Italy and Russia provided the background for a revival of Natural Law theory after the Second World War, under the auspices of Radbruch, Fuller and later Finnis and, in the form of interpretivism, Dworkin. Some of the Scandinavian Legal Realists were thought to be tainted by association with such regimes. In the US, Legal Realism which seemingly had its heyday in the late 1920's and the 1930s and was closely associated with the empirical, particularist and behavioural approach of scientific naturalism, also seemed to fall away because of the same events. Secular and Thomist Natural Law theorists, proponents of philosophical rationalism and others argued that scientific rationalism generally, and Legal Realism in particular, failed to reflect ethical, moral and democratic values.

There does not have to be a legal theory, a movement or even a law school for a university to contribute to the promotion of social justice in thought and action. The work of Professor Stuart Hall at the Open University, for example, had a huge influence in anticipating by decades the 2020 phenomenon of #BlackLivesMatter. The Open University more generally made a vital contribution in Northern Ireland in the education of those interned or imprisoned in the Troubles in the 1970s, principally through its pioneering courses on Sociology. Its very

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jurisprudence as the theoretical aspect of law-as-a discipline (i.e. academic law) and the important functions it can potentially perform: W. Twining, 'Academic Philosophy and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *The Law Quarterly Review* 557, 574-5.

<sup>3</sup> HLA Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961).

<sup>4</sup> Described as '[One] of the most interesting and original figures in twentieth-century American jurisprudence' in G Gilmore, *The Ages of American Law* (New Haven, Yale University Press, 1977) 115 footnote 11.

<sup>5</sup> KN Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York, Routledge, 2008), originally published in 1962.

<sup>6</sup> W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York, Cambridge University Press, 2012) 149. This second edition contains an Afterword by Twining, which provides a re-assessment of some aspects of Llewellyn's works as well reviewing academic commentary since the publication of the first edition in 1973.

presence in the different parts of the United Kingdom and in the different parts of the island of Ireland anticipated, on the one hand, devolution in the UK and, on the other, closer cooperation in pursuit of peace and justice through the Belfast (or Good Friday) Agreement of 1998.

Then, towards the end of the millennium, the OU Law School had its beginnings. The teaching of Law as a degree in its own right has seen it become, in its first twenty years, the biggest law school by student numbers in Europe. Its first undergraduates learned about European Union jurisprudence as a key source of UK law. The most recent, after 31 January 2020, are graduating after the UK has left the European Union. Few could have anticipated this development with its immense ramifications for the law in, and the different legal systems of, these islands. It has been quickly followed by an even bigger shock as the Covid-19 pandemic of 2020 led to an astonishing turn of events, in which many people all over the world were confined to their homes. We consider the effects of this and other aspects of the pandemic in a jurisprudential context in the Sections which follow.

### 1.1 'What officials do ...'

In this chapter, and in contrast, surprisingly, to Twining himself in this context,<sup>7</sup> we take seriously Karl Llewellyn's two statements, which appeared in the original edition of *The Bramble Bush* published in 1930,<sup>8</sup> that '*What these officials do about disputes is, to my mind, the law itself*' and that '*rules are ... important ... in so far as they help ... see or predict what judges will do or so far as they help ... get judges to do something. ... That is all their importance, except as pretty playthings.*' (Llewellyn's emphasis).<sup>9</sup> We refer hereafter to these two statements collectively as 'What officials do ...', since the second of these two statements is relevant to Llewellyn's defence of his first statement. The primary (but not exclusive) emphasis in what follows will, however, be placed on the thirteen words contained in the first statement in 'What officials do ...' which we contend contains an important kernel of truth.

As Section 2 describes, 'What officials do ...' became the subject of a torrent of criticism which began in the 1930s and continued into the 1950s and beyond, not least by HLA Hart. These words were subsequently reconsidered by Llewellyn in his Foreword to the subsequent 1951 edition of *The Bramble Bush*, under a section entitled '*Correcting an error: 'What these officials do about disputes ...'*'.<sup>10</sup> That correction has wrongly been put forward by some commentators (including Twining) as amounting to their retraction or repudiation by Llewellyn. However, 'What officials do ...' was left standing by Llewellyn in the main body of the text of the 1951 edition of *The Bramble Bush* notwithstanding that correction and was neither retracted nor repudiated by him although it was significantly qualified in the Correction.

We consider in some detail in Section 2 the nature of the criticisms which were made of 'What officials do ...' and the terms in which those words were qualified by Llewellyn. We contend, firstly, that those criticisms took those words out of the true context in which they were used in Chapter 1 of *The Bramble Bush*, which was that of judicial decision-making and reasoning in court cases and their enforcement by others. Even here, 'What officials do ...' reflected the

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<sup>7</sup> See Section 2 below.

<sup>8</sup> KN Llewellyn, '*The Bramble Bush: Some Lectures on Law and Its Study*' (Privately printed edition, 1930) 3. This edition, to which we refer hereafter as 'the 1930 edition' was printed in 1930 and described in the frontispiece as "a tentative printing for the Use of Students at Columbia School of Law, New York". The 1930 edition was reproduced in *Karl Nickerson Llewellyn on Legal Realism* (Birmingham, Alabama, The Legal Classics Library, 1986). This was also privately printed, in this case for the members of the Legal Classics Library.

<sup>9</sup> KN Llewellyn, *The Bramble Bush: On Our Law and Its Study*, 2nd edn (Dobbs Ferry, New York, Oceana Publications, 1951) 12 and 14. Save where otherwise stated, references hereafter to *The Bramble Bush* are to the 1960 printing of the 1951 edition, the last printing published in Llewellyn's lifetime and which contained an addition to Llewellyn's footnotes. The latest edition (KN Llewellyn, *The Bramble Bush: The Classic Lectures On the Law and Law School* (New York, Oxford Publishing Inc, 2008)) adopts a new title with a new Introduction and Notes by Steve Sheppard.

<sup>10</sup> *Ibid*, 3.

importance of the institutional context in which court decisions were made by judges and the underlying reasons for those decisions were given.

## 1.2 The 'Law-Jobs' and 'Law and Government' Theory

Secondly, we argue in Section 3 that 'What officials do about disputes ...', which was not intended by Llewellyn as a conceptual definition of law, has a wider institutional and societal context beyond simply the way in which judges decide court cases and the way in which those decisions are enforced. That context is the role which various groups in society (including, for these purposes, legal officials, legislators, government, executive and administrative officials) play and the ways which they adopt in, amongst other things, seeking to resolve 'trouble cases' which would otherwise frustrate or impair the operation of society as a larger group as a whole. 'What officials do ...' is therefore of significant importance in the wider jurisprudential and sociological perspective which Llewellyn adopted in setting out his 'law-jobs' theory in *The Cheyenne Way*<sup>11</sup> and 'The Normative, the Legal and the Law Jobs: The Problems of Juristic Method'.<sup>12</sup> This theory embodied what Llewellyn later came to designate as the theory of the single institution of 'law-government' or 'law-and-government' in 'Law and the Social Sciences – Especially Sociology'.<sup>13</sup>

## 1.3 'Law-Jobs', 'Law-Government' and Covid-19

In Section 4, we use this institutional theory of 'law-government' as a jurisprudential framework to examine and evaluate various aspects of official behaviour in the UK in relation to the Covid-19 lockdown. These aspects are very wide and diverse indeed. They can encompass, amongst other things, the authority and actions of legal, parliamentary and administrative bodies in formulating and implementing policy, the use and interpretation of legislation and regulations, the role of governmental guidance and the advice of public bodies which contributes to both that guidance and the formation of public health policy generally, enforcement of legislative rules and regulations by the police, the actions of local authorities, differences of approaches between the Four Nations, human rights, and the role, impact and effect of public opinion in the formulation and enforcement of the relevant rules and regulations.

The Covid-19 pandemic has had a widespread and, in some cases, a devastating effect on public health. The restrictions imposed from time to time, including lockdown, have in turn had significant adverse economic effects as well as an impact on the well-being of individuals. We conclude in Section 5 that the jurisprudential insights afforded by the evaluation of institutional behaviour in reaction to the Covid-19 pandemic through the framework of the 'law-jobs' theory demonstrates the continuing relevance of the statement 'What officials do ...' to Llewellyn's notion of the 'law-government' institution, which remains of importance in jurisprudence today. The Covid-19 pandemic may therefore have a significant effect on thinking in jurisprudence, just as the cataclysmic events of the Second World led to the revival of Natural Law theory. The 'new normal' for teaching jurisprudence, and for writing jurisprudentially, is therefore going to be different to the way in which we thought about law before lockdown.

## 2. 'What Officials do ...'

Since we attach such importance to the words 'What officials do ...', it is incumbent upon us to explore and examine in some detail not only the reasons why those words gave rise to

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<sup>11</sup> Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman, University of Oklahoma Press, 1941).

<sup>12</sup> KN Llewellyn, 'The Normative, the Legal and the Law Jobs: The Problems of Juristic Method' (1940) 49 *Yale Law Journal* 1355.

<sup>13</sup> Karl N Llewellyn, 'Law and the Social Sciences – Especially Sociology' (1949) 62 *Harvard Law Review* 1286.

such debate in the first place but also Llewellyn's answer to the criticisms which were made of them. That answer is significant here because it is of great relevance to the arguments which we advance in this chapter.

## 2.1 The Criticism

The words 'What officials do ...' appeared in the original 1930 edition of *The Bramble Bush*,<sup>14</sup> which consisted of introductory lectures to students at Columbia Law School on the study of law. As such, those lectures were essentially pedagogic in nature and the first lecture contained what might best be described as rhetorical flourishes in prose which, amongst other things, were designed to 'shock' students out of any notion of the study of law as consisting simply of the rote learning of rules of law. Indeed, Llewellyn stated in the Preface to the 1930 edition<sup>15</sup> (which was subsequently incorporated in the Foreword to the 1951 edition)<sup>16</sup> that *The Bramble Bush* was intended not as a primer type of introduction but as a standing introduction, which must 'invite, excite, to a second reading, and a third and fourth; each reading in the measure that the student has moved on into the law and gained the wherewithal to read, must introduce him further' and 'must cut as deep as its author has wit and strength to go'.<sup>17</sup> Here, it may be noted that HLA Hart's *The Concept of Law*<sup>18</sup> was also based on introductory lectures in jurisprudence<sup>19</sup> for undergraduate students with, amongst other things, the pedagogic aim of discouraging the belief that a book on legal theory is primarily a book from which one learns what other books contain, which Hart considered to be of very small educational value.<sup>20</sup> Both *The Bramble Bush* and *The Concept of Law* came to have a wider general significance in jurisprudence beyond their authors' intended status of those books as introductory texts.

The second statement in 'What officials do', namely that '*rules* are ... important ... in so far as they help ... see or predict what judges will do or so far as they help ... get judges to do something. ... That is all their importance, except as pretty playthings' contained an element of rhetorical flourish. The first statement, '*What these officials do about disputes is, to my mind, the law itself*' did not, although, as we will see below, Llewellyn admitted that it was incomplete in itself. Both statements caused great controversy. This controversy arose in the general context of attacks against scientific naturalism and pragmatism. Scientific naturalism emphasised behaviourism and empirical, particular and experimentally verifiable knowledge and sought to deny any notion of absolute knowledge based on moral or ethical *a priori* knowledge gained through moral or ethical reasoning.<sup>21</sup> That attack was also an attack against Legal Realism, which was seen as embodying the natural scientific and pragmatic approaches,<sup>22</sup> and also against Llewellyn himself. Within the sphere of jurisprudence, in the eyes of natural lawyers and others,<sup>23</sup> Legal Realism, and particularly Llewellyn's words, attacked the existence of rules and the role and method of deductive logic in judicial reasoning.<sup>24</sup>

This had, in the eyes of those critics, the effect of denying the existence of not only any notion of certainty in legal cases but also the traditional inherent ethical and democratic values which were to be found in the US legal systems and which were embodied within the concept of the

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<sup>14</sup> See Section 1 n8 above.

<sup>15</sup> Ibid, vii.

<sup>16</sup> See Llewellyn, *Bramble Bush*, 7.

<sup>17</sup> Ibid.

<sup>18</sup> 1st edn (Oxford, Clarendon Law Series, OUP, 1961).

<sup>19</sup> See Leslie Green's Preface to Hart, *Concept of Law*, 3rd ed (Oxford, Clarendon Law Series, OUP, 2012) xi.

<sup>20</sup> Hart, *Concept of Law*, 1st edn (1961), vii.

<sup>21</sup> See, generally, Edward A Purcell, *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (Kentucky, The University Press of Kentucky, 1973) Chapter 2 'Naturalism and Objectivism', 15.

<sup>22</sup> Ibid, Chapters 5 'The Rise of Legal Realism' and 9 'Crisis in Jurisprudence', 74 and 159.

<sup>23</sup> Including Fuller, Dickinson, Goodhart, Kantorowicz, Kocourek and Roscoe Pound - see Llewellyn, *Bramble Bush*, 1951 edn, 10.

<sup>24</sup> See Llewellyn, *Bramble Bush*, 10.

rule of law. Instead Llewellyn and the legal realists supposedly replaced the rule of law with the rule of judges, with judicial decisions being based on the prejudices and psychological inclinations of individual judges.<sup>25</sup> Accordingly, in the views of many of its opponents, Legal Realism was essentially amoral in its approach and either dismissed or took no account of the traditional democratic and general societal values embodied within the US legal system and other legal systems within western societies.<sup>26</sup> As will be seen in Section 2.2, however, such accusations against Llewellyn himself were essentially misplaced and unjust.

## 2.2 Llewellyn's answer

These attacks led to Llewellyn including, in his Foreword to the 1951 edition of *The Bramble Bush*, a section headed, in a rather dramatic style and emphasised in italics, '*Correcting an Error: What these officials do about disputes ....*'.<sup>27</sup> In that section, Llewellyn states that these are 'plainly unhappy words when not more fully developed and at best a very partial statement of the whole truth':

'For it is clear that one office of law is to control officials in some part, and to guide them even in places where no thoroughgoing and control is possible, or is desired. And it is clear that guidance and control *for* action and by others than the actor cannot be had out of the very action sought to be controlled or guided.'<sup>28</sup> (Llewellyn's emphasis)

This statement has been described as a retraction of the words 'What officials do ...' by Twining<sup>29</sup>, Hart<sup>30</sup> and Duxbury<sup>31</sup> - and as having been withdrawn by Postema.<sup>32</sup> However, we argue that Llewellyn did not retract nor withdraw those words although he *did* significantly qualify them in the Foreword to the 1951 edition (as, indeed, he also did in *The Bramble Bush* itself as we describe below). Nevertheless Llewellyn stated that he had let those words stand in the 1951 edition as they were both useful and true in so far as:

'The words pose the problem of reform of institutions and press upon us the external problem of the need for personnel careful upright and wise. They signal the possibility of differential favouritism and prejudice on the one hand; the possibility, on the other, of much good being brought out of an ill-designed and limping machinery of measures.'<sup>33</sup>

In Chapter V of *The Bramble Bush* itself, Llewellyn stated that he needed to backtrack from 'What officials do ...' in Chapter I by asserting, as a 'corrected hypothesis' that:

<sup>25</sup> Duxbury has described this portrayal as a 'caricature' and 'popular burlesque' - see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford, Clarendon Press, 1997), 66-8 (originally published in 1995).

<sup>26</sup> See Purcell, *The Crisis of Democratic Theory*, Chapter 9, 'Crisis in Jurisprudence' 159.

<sup>27</sup> See Llewellyn, *Bramble Bush*, 8.

<sup>28</sup> Llewellyn, *Bramble Bush*, 9. The phrase 'one office of law' may here be taken to mean one role, function or purpose of law.

<sup>29</sup> William Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York: Cambridge University Press 2012) at 149. The second edition, cited here, contains an Afterword by Twining, which provides a re-assessment of some aspects of Llewellyn's works as well reviewing academic commentary since the publication of the first edition in 1973.

<sup>30</sup> Hart considered the two statements contained in 'What officials do ...' as extreme in their nature as they suggested that the notion of rules controlling courts' decisions was senseless, but considered that Llewellyn had 'recanted' from this position by his statements which we have set in the preceding paragraph: see HLA Hart, 'Positivism and the Separation of Law', 71 *Harvard Law Review*, 593, 616, footnote 40 and the text to which that footnote relates. This article formed the beginning of what has become known as the 'Hart-Fuller' debate. Hart did not refer to this 'recantation' in Chapter 7 of *The Concept of Law* when discussing 'rule-scepticism' but did subsequently describe Llewellyn as having retracted 'What officials do ...' although making clear at the same time that he considered Llewellyn to be one of the 'serious American jurists' despite his extravagant statements in 'What officials do' - see HLA Hart, 'American Jurisprudence through English Eyes: The Nightmare and Noble Dream' (1977) 11 *Georgia Law Review* 969, 970 and 974.

<sup>31</sup> Neil Duxbury, *Patterns of American Jurisprudence*, 105

<sup>32</sup> Gerald J Postema, Vol 11, *Legal Philosophy in the Twentieth Century: The Common Law World, of A Treatise of Legal Philosophy and General Jurisprudence* (Carolina, Springer Dordrecht, 2016) 83, n 8.

<sup>33</sup> Llewellyn, *Bramble Bush*, 9.

‘... law must embrace in its very heart and core what the officials do, and that rules take on meaning in life only as they aid one either to predict what officials will do or get them to do something. Or, if you prefer to state the dispute aspect of law broadly enough ... that a heart and core of living law is how disputes are in fact are settled, and that rules take on live meaning only as they bear on that’<sup>34</sup>

## 2.3 Two significant aspects of ‘What officials do ...’

We contend that two very significant aspects attach to the passage in Chapter V of *The Bramble Bush*. The first is that ‘What officials do ...’, whether in its original form as given in Chapter I or in the form of the ‘corrected hypothesis’ in Chapter V, was never intended by Llewellyn as a conceptual definition of law. Here we agree with Twining. The second, which follows from the first, is that the ‘corrected hypothesis’ in Chapter 5 highlights what we say was in any event inherent in the form of wording of ‘What officials do ...’ in Chapter 1, namely that those words were intended by Llewellyn to highlight the institutional role which judges as individual officials of the courts played in resolving disputes and the manner in which they did so.

### 2.3.1 Not a Conceptual Definition

Turning to the first of these aspects, in one of his most famous papers published in the same year as the first edition of *The Bramble Bush*, Llewellyn cast strong doubt on feasibility of framing any conceptual definition of such a loose suggestive symbol as “law”.<sup>35</sup> Llewellyn observed that the overwhelming difficulty of seeking to define the periphery of the field of law was that there were so many things to be included within it and that those things were of such a disparate nature that they could not easily be fitted under one ‘verbal roof’.<sup>36</sup> Accordingly, any conceptual definition will confine that periphery in a rather arbitrary fashion, necessarily including some matters within, but excluding others from, the periphery of that field. In discussing the scope of legal realism and realistic jurisprudence, Llewellyn therefore sought instead to focus upon a point of reference to which he believed all matters legal can be most usefully referred without putting or pushing anything outside of the field or concept of law:

‘I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining’<sup>37</sup>

The mistaken perception that ‘What officials do ...’ amounted to a conceptual definition of law probably contributed to the general controversy which surrounded Legal Realism and Llewellyn’s jurisprudence in the 1930s as described in Section 2.1. Llewellyn referred to that controversy as ‘a teapot tempest’ which read rather like ‘a grotesque farce’, complaining that ‘realism’, which Llewellyn maintained was an effort to achieve a more effective legal technology, had been mistaken for a philosophy. Llewellyn complained that ‘What officials do ...’ had been

‘made the scape-goat for all the sins (real and supposed) of administrators and autocrats and the ungodly in general’<sup>38</sup>  
and used to show Llewellyn himself

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<sup>34</sup> Llewellyn, *Bramble Bush*, 75-6.

<sup>35</sup> Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ (1930) 30 *Columbia Law Review* 431. See also KN Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York and London, Routledge, 2008) 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 432.

<sup>38</sup> Llewellyn, *Bramble Bush*, 9-10.



‘to disbelieve in rules, to deny them and their existence and desirability, to approve and exalt brute force and arbitrary power and unfettered tyranny, to disbelieve in ideals and particularly in justice.’<sup>39</sup>

### 2.3.2 The institutional context of ‘What officials do ...’

Twining strongly disputed that ‘What officials do ...’ had been put forward by Llewellyn as a conceptual definition of law.<sup>40</sup> We agree with Twining’s assertion. Twining considered that ‘What officials do ...’ and *The Bramble Bush* were essentially a pedagogic introduction to Llewellyn’s juristic ideas addressed particularly to first year students, but did not, however, consider them as representative of Llewellyn’s work as a scholar nor as a jurist in 1930, still less of his more mature work, stating:

‘To do so would almost be akin to judging the achievement of TS Eliot on the basis of *Old Possum’s Book of Practical Cats*’.<sup>41</sup>

Indeed, in his book review of Llewellyn’s *The Case Law System in America*,<sup>42</sup> Twining suggested that, on this basis, the contribution to jurisprudence of *The Bramble Bush* may be discounted.<sup>43</sup>

With this assessment we respectfully disagree, while fully recognising of course, the essentially pedagogic introductory intent and nature of the text of *The Bramble Bush*. The very nature of the first statement in ‘What officials do ...’, namely ‘*What these officials do about disputes is, to my mind, the law itself*’ evokes the description of law in operation, law ‘as it is’ or law in action and the institutional role of the courts and the institutional manner in which they operate. Llewellyn’s *Präjudizienrecht und Rechtsprechen in Amerika*,<sup>44</sup> is regarded as a major piece of work.<sup>45</sup> It was based on lectures given by him at the Leipzig Faculty of Law in 1928- 9, at least one year prior to the publication of *The Bramble Bush*, although it was not published until 1933. In *Präjudizienrecht*, Llewellyn used the word ‘institution’ and ‘institutions’ in a slightly different sense to that in which he used those terms in the ‘law-jobs’ theory and in the ‘law-government’ institution. In the Leipzig lectures, Llewellyn used ‘institutions’ to refer to groups of rules and decisions of the courts and the operation and use of such groups of cases as precedents.<sup>46</sup> This was very similar to the way in which Llewellyn recommended that students should analyse the use of precedent in American case law in Chapter IV of *The Bramble Bush* which, in turn, presaged Llewellyn’s later description of juristic method in the ‘law-jobs theory. Similarly some parts of Chapter VII of *The Bramble Bush* presaged, albeit in embryonic form, parts of the ‘law-jobs’ theory.<sup>47</sup> The suggestion that *The Bramble Bush* was not representative of Llewellyn’s work as a scholar and a jurist and that its contribution which made to jurisprudence may be discounted therefore seems inaccurate despite the essentially pedagogic context in which it was written.

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<sup>39</sup> Ibid.

<sup>40</sup> W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York, Cambridge University Press, 2012) 148-50.

<sup>41</sup> Ibid, 152.

<sup>42</sup> William Twining, ‘The Case Law System in America’ (1991) 100 *Yale Law Journal* 1093.

<sup>43</sup> Ibid, 1094.

<sup>44</sup> Karl N Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika* (Leipzig, Theodor Weicher, 1933). An English translation of Part I, Books 1 and 2 of *Präjudizienrecht* (without the Cases and Materials in Part II) was not published until 1989 – see Karl N Llewellyn (ed P Gewirtz, trans M Ansaldi), *The Case Law System in America* (Chicago, Chicago University Press, 1989).

<sup>45</sup> See, for example, Paul Gewirtz’s Introduction to KN Llewellyn, *The Case Law System in America*, x footnotes 3 and 4, which lists the academic reviews of *Präjudizienrecht*, including those of Fuller – see L. Fuller, ‘American Legal Realism’ (1934) 82 *University of Pennsylvania Law Review* 429 and L Fuller, ‘Book Review’ (1934) 82 *University of Pennsylvania Law Review* 551.

<sup>46</sup> See KN Llewellyn, *The Case Law System in America* 10 footnote 1 and §§64 and 65, 95-8.

<sup>47</sup> Llewellyn described this Chapter as ‘richly unripe, but unripe’ in KN Llewellyn, *The Bramble Bush*, 107.

### 3. Llewellyn's 'Law-Jobs' Theory and the Institution of Law-Government

In section 1.3, we highlighted the very wide and diverse nature of the jurisprudential aspects of official and institutional behaviour which fall to be considered in relation to the Covid-19 lockdown in the UK. These aspects extend well beyond a narrow notion of 'law' which encompasses merely court proceedings, the interpretation of statutes and delegated legislation, and any Human Rights and/or constitutional issues which may arise therefrom. They include not only the enforcement of the relevant rules and regulations by the police but also the legislative and regulatory processes themselves, the practice and expectations of those persons and bodies involved in the legislative, regulatory and administrative processes (including bodies such as Public Health England (PHE) and the Scientific Advisory Group for Emergencies (SAGE) who advise on the formulation of policy in relation to public health issues), and also political advisors. Thus, the notion of 'law' in this context extends to and encompasses a whole range of disparate activities associated with the 'law', some of which would often be regarded as extending beyond what is understood as the notion of the 'legal'.

Most, but by no means all, of these aspects involve the activities of 'officials'. The officials referred to by Llewellyn in 'What officials do ...' included not only judges and lawyers but enforcement bodies such as the police and the prison service (Llewellyn's 'sheriffs' and 'jailors'),<sup>48</sup> a list of officials which was compiled in relation to their actions about 'disputes'. However, Llewellyn immediately followed his statement by criticising the approach to law which was based on the notion of the heart of law as comprising a set of rules of conduct enforced by external constraint,<sup>49</sup> laid down by the state and addressed to the people 'on the street'.<sup>50</sup> Llewellyn thought such an approach was misleading and that there was much to be said in some parts of the law for the view that 'rules *for* conduct' should be the focus 'quite *apart from disputes*'<sup>51</sup> (Llewellyn's emphasis), including rules which looked not so much to disputes as to administrative convenience, and rules which looked primarily to avoiding not disputes but injuries and harm.

Accordingly, Llewellyn considered that examples of rules of conduct went not so much to the importance of rules but to 'the *non-exclusive*' importance of '*disputes*'<sup>52</sup> (Llewellyn's emphasis). This led to Llewellyn making what was to him the fundamentally important observation in relation to the necessary approach to 'lawyering' (or practising what was to him the 'craft' of the law):

'And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing – a regularity which makes possible prediction of what they and other officials are about to do tomorrow. In many cases that prediction cannot be wholly certain. Then you have room for something else, another main thing for the lawyer: the study of how to make the official do what you would like to have him'.<sup>53</sup>

The rules and regulations to which Covid-19 has given rise comprise both rules *of* and *for* conduct in this sense and they have been devised for the principal purpose of protecting the health of the public and thereby minimising the harm to health caused by Covid-19. Evaluating how such rules and regulations give effect to this purpose from a jurisprudential view will therefore involve considering the activities of the full range of officials referred to above. We

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<sup>48</sup> See *The Bramble Bush*, 12.

<sup>49</sup> Described by Llewellyn as such in order to distinguish them from rules of morality and some phases of custom.

<sup>50</sup> *Ibid*, 12-13.

<sup>51</sup> *Ibid*, 13.

<sup>52</sup> *Ibid*, 13.

consider that the 'law-jobs' theory, which embodies the notion of the single institution of 'law-government' as its integral part, provides a coherent overall jurisprudential framework and perspective for evaluating all these aspects, using Llewellyn's wider institutionalist and sociological approach.

As Llewellyn emphasised in 'A Realistic Jurisprudence – The Next-Step',<sup>54</sup> when discussing the limitations of a conceptual definition of law, one cannot always easily draw the line in distinguishing the 'legal' from the 'non-legal' since, depending upon one's centre of interest, matters which might otherwise be regarded as 'background', 'foreground' or 'underground' cannot easily be disregarded when discussing the 'legal'.<sup>55</sup> A wider perspective must then be necessary, which is provided by the 'law-jobs' theory and the institution of 'law-government'.

### 3.1 The 'Law- Jobs' Theory

Llewellyn primarily described this theory in in *The Cheyenne Way*<sup>56</sup> and his paper 'The Normative, the Legal and the Law Jobs: The Problems of Juristic Method'.<sup>57</sup> The 'law-jobs' were designed to address certain needs that must be met if a human group is to survive as a group and to achieve the purposes for which the group exists. He classified these 'law-jobs' into the six categories, namely (i) 'adjustment of the trouble case'; (ii) preventive channelling of conduct and expectations; (iii) 'preventative rechannelling of conduct and expectations to adjust to change'; (iv) 'arranging for the say and saying of things' – that is to say, allocation of authority and procedures for authoritative decision-making; (v) provision of direction incentives within the group (which Llewellyn referred to at the job of providing 'net Positive Drive'); and (vi) 'the job of Juristic Method'.<sup>58</sup>

The ways in which courts and other institutions sought to address and resolve 'trouble cases' - disputes, conflicts and sources of grievance – by what Llewellyn termed as 'juristic method' in situations such the Covid-19 pandemic health crisis are best illustrated and analysed by reference to concrete situations. Accordingly, the application of the individual 'law-jobs' will be considered in detail in Section 4.

### 3.2 The Law-Government Institution

Twining has explained the inter-relationship between Llewellyn's theory of 'law-jobs' and the institution 'law-government' in the following terms:

'Groups which qualify to be called societies have 'institutions', more or less developed and specialised, the peculiar function of which is to perform these law-jobs'. Llewellyn's later usage 'law-and-government' (or 'law-government') is the term used to refer to such institutions. In society 'law-government' is the main but not the only institution for performing the law-jobs listed above; conversely 'the law-jobs are the main but not the only jobs of the institution of law government.'<sup>59</sup>

The institution of 'law-government' is most clearly explained by Llewellyn in his paper 'Law and The Social Sciences – especially Sociology',<sup>60</sup> in which he described the concept of an 'institution' as 'the central and most important concept in social science',<sup>61</sup> referring to the

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<sup>54</sup> Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 *Columbia Law Review* 431.

<sup>55</sup> *Ibid*, 431-2.

<sup>56</sup> Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman; University of Oklahoma Press (1941).

<sup>57</sup> KN Llewellyn, 'The Normative, the Legal and the Law Jobs: The Problems of Juristic Method' (1940) 49 *Yale Law Journal* 1355.

<sup>58</sup> *Ibid*, 1375-1397.

<sup>59</sup> Twining, *Karl Llewellyn and the Realist Movement*, 179 n 37.

<sup>60</sup> Karl N Llewellyn, 'Law and the Social Sciences – Especially Sociology' (1949) 62 *Harvard Law Review* 1286.

<sup>61</sup> *Ibid*, 1290, n 2.

discussion of that concept by Walton Hamilton.<sup>62</sup> Hamilton describes an 'institution' in the following terms:

'Institution is a verbal symbol which for want of a better describes a cluster of social usages. It connotes a way of thought or action of some prevalence and permanence which is embedded in the habits of a group or the customs of a people. In ordinary speech it is another word for procedure, convention or arrangements.'<sup>63</sup>

In his paper 'The Constitution as an Institution',<sup>64</sup> Llewellyn described an institution as in the first instance a set of ways of 'living and doing'<sup>65</sup> but subsequently amended that description by stating that 'I should today focus first upon the *jobs* to be done, around whose doing ways both get organised and take on meaning'.<sup>66</sup>

As to the institution of 'law-government' itself, Llewellyn described it as in essence a single institution which is recognized as having the proper authority to speak for 'the 'Whole of us' or 'the Entirety' and provides the machinery for 'conscious re-kiltering, for deliberate correction, for planned cure'<sup>67</sup> through the performance of the 'law-jobs'. Although 'law-government' is in essence one single institution which carries out the various 'law-jobs' on behalf of a group, those 'law-jobs' will be performed at any one time by a number of separate institutions such as courts, legislators and administrators in various ways which will interact and combine with each other in forming the institution of 'law-government' as a whole. Again, in the context of Covid 19, the 'law-government' institution will be evaluated through the examination of concrete instances in Section 4.

## 4. Applying Llewellyn's approach to Covid-19

### 4.1 'Trouble-cases' and the essential job of the 'Law-government' institution

Llewellyn indicated that, in his 'law-jobs' theory, a 'trouble-case', which can consist of an offence, grievance or dispute, is typically a minor, "individual" trouble which by itself is usually 'bearable' trouble. As such it can be compared to 'garage-repair work' on the general order of the group and a trouble-case would disrupt continuance of group life only if sufficiently multiplied and sufficiently cumulative.<sup>68</sup> Viewed from this perspective, however, the Covid-19 pandemic is an atypical, magnified 'trouble-case' writ large in both its scope and ambit. Its widespread impact on the population throughout the UK has not only given rise to a crisis in public health but the rules and regulations enacted to counter that crisis through the implementation of lockdown and other measures have had a severe economic impact on businesses and employment. They have adversely affected the well-being of families and individuals confined to their homes and disrupted school and university education.

All of these matters have, in turn, tested the 'law-government' institution's performance of the 'law-jobs' in a number of ways and have caused that institution to be subjected to wide-ranging public scrutiny and debate. The pandemic provides in stark relief an instance of what Llewellyn described as 'the great and basic job on which the institution of 'law-government' is focused:

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<sup>62</sup> W Hamilton, 'Institution' (1932) *Encyclopedia of Social Science* 84.

<sup>63</sup> Ibid, cited in W Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (New York, Cambridge University Press, 2012) 176.

<sup>64</sup> KN Llewellyn, 'The Constitution as an Institution' (1934) 34 *Columbia Law Review* 1.

<sup>65</sup> Ibid, 17.

<sup>66</sup> This amendment was contained in the excerpt from 'The Constitution as an Institution' which was reproduced in Karl N Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New York and London, Routledge, 2017), 233, footnote b (originally published in 1962 by the University of Chicago Press).

<sup>67</sup> Llewellyn, 'Law and the Social Sciences – Especially Sociology' 1296.

<sup>68</sup> Llewellyn, 'The Normative, the Legal, and the Law-jobs: The problem of Juristic Method' (1940) 49 *Yale Journal* 1375-6.

‘It is the job, for any group, for any community, for any society, of becoming and remaining and operating as *enough* of a unity, with *enough* team-work, to be and remain recognisable as a group or as a political entity or as a society. The fundamental law-and-government job is, then, the job that is fundamental to the existence of any society and any social discipline at all: it is the job of producing and maintaining the groupness of a group’.<sup>69</sup> (Llewellyn’s emphasis)

In the UK, court litigation by way of judicial review of the Covid-19 legislation and regulations, from the period beginning with the imposition (in England) of the first lockdown period in March 2020 to the end of the second lockdown period in December 2020, has been scarce. An exception is the *Dolan* case<sup>70</sup> which raised the issue of whether the lockdown restrictions imposed by regulations 6 and 7 of the Public Health Act (Control of Disease) Act 1984 were *ultra vires* and/or in breach of the rights to liberty, respect for private and family life and to freedom of assembly and movement under Articles 5, 8 and 11 respectively of the ECHR.<sup>71</sup>

‘Trouble-cases’ arising under the Covid-19 restrictions may, however, be dealt with by the intervention of institutions other than the courts and, indeed, by means other than the regulations imposing those restrictions. Thus, for example, where members of more than one household meet inside or outside a particular property, they may cause nuisance and disturbance to immediate neighbours as well as being in breach of those restrictions. In that event, the local authority may intervene to prevent such an assembly on the grounds of noise, nuisance or disturbance, irrespective of whether there has been any intervention by the police on the grounds of a breach of the relevant Covid-19 restrictions.<sup>72</sup>

## 4.2 Separate Institutions within the Single Institution of ‘Law-government’

The last example given in section 4.1 illustrates two important facets of Llewellyn’s concept of the ‘law-government’ institution. Firstly, that institution, although a single institution in itself, can embrace under its umbrella a number of separate groups or institutions in their own right beyond the courts themselves. They extend to institutions (as defined in Section 3.2 above) such as the government, the legislature, the police, local authorities and all other bodies which have separate regulatory, enforcement or administrative functions.

The second facet is that the overall effectiveness of the ‘law-government’ institution will often depend on the way in which those separate institutions interact.<sup>73</sup> Their functions, which

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<sup>69</sup> See Llewellyn, ‘Law and the Social Sciences – especially Sociology’, 1292.

<sup>70</sup> *Dolan v Secretary of State for Social Care* [2020] EWHC 1786 (Admin). An appeal against that decision was heard on 29 and 30 October 2020, in which was argued that the UK’s lockdown rules were among ‘the most onerous restrictions to personal liberty’ in almost four centuries. At the date of writing, its outcome was unknown – see R. Craig, ‘Coronavirus Regulations Case reaches the Court of Appeal - Hearing Dates 29-30 October 2020’ (*UK Constitutional Law Blog*, 28 October 2020) <[ukconstitutionallaw.org/](https://ukconstitutionallaw.org/)> and also Jonathan Ames, ‘Simon Dolan: Coronavirus lockdown restrictions were unlawful, entrepreneur tells judges’ *The Times* (London, 30 October 2020).

<sup>71</sup> Similar arguments have consistently been raised by Jonathan Sumption QC, the retired Supreme Court Justice, who has maintained that it “is our business, not the state’s, to say what risks we will take with our own health.” – see ‘Lord Sumption: The only coherent position is locking down without limit – or not locking down at all’ *Prospect* (London, 26 May 2020) (in reply to Professor Thomas Poole, ‘A new relationship between power and liberty’ *Prospect* (London, 23<sup>rd</sup> May 2020) and his Cambridge Freshfields Annual Lecture ‘Government by decree – Covid-19 and the Constitution’ (Cambridge, October 2020) <[www.youtube.com/watch?v=amDv2gk8aa0](https://www.youtube.com/watch?v=amDv2gk8aa0)>.

<sup>72</sup> Such an instance arose within the personal experience of one of the co-authors of this chapter, who lives in a small close of houses, comprising a mixture of both tenanted and privately owned houses facing on to a central communal lawn. One neighbour began to hold regular parties on the communal lawn to which he invited people who were not residents in the close. Those parties sometimes lasted until late at night, causing nuisance and annoyance to other neighbours. The parties were in flagrant breach of the Covid-19 regulations then in force but there was no intervention by the police. The parties were eventually stopped through the intervention of a Housing Officer of the local authority concerned.

<sup>73</sup> Llewellyn, ‘Law and the Social Sciences’, 1290.

comprise the totality of the 'law-government' institution, will often overlap. In the particular context of the UK, there are four political systems and three legal systems.<sup>74</sup> Wales, Scotland and Northern Ireland each possess separate devolved institutions of government and powers. Each have adopted different responses to the pandemic. Their responses will inevitably vary in accordance with the political composition of the elected representative bodies in each political system with, for example, different restrictions being applied in Wales and England, even though both of those countries share one legal system. Different periods of lockdown have been announced from time to time in each country. The introduction of the tier system in selected areas and regions within each country complicates the position further. It is, however, noteworthy that before announcing the ending of the second period of lockdown in England and the new tier system to follow in December 2020, the Government consulted with each of the devolved administrations in Wales, Scotland and Northern Ireland over the nature of the relaxation of restrictions which were to be applied over the Christmas period. This demonstrates the degree of overlap which can occur within the overall institution of 'law-government'.

The precise 'legal'<sup>75</sup> nature of the various separate bodies or institutions which together comprise the single institution of 'law-government' will also vary according to the functions of each body. In England, for example, the Government has sought the advice and recommendations of PHE<sup>76</sup> and SAGE<sup>77</sup> for medical and scientific advice in relation to the precise nature of the restrictions which are necessary to reduce the rate and spread of infection of Covid-19. Such advice assists the Government in deciding the precise form and substance of both the necessary legislative measures and regulations and the guidance which should be published by way of advice to the public on their effect.<sup>78</sup>

Individually the roles of the Government, PHE and SAGE might be taken to represent what Llewellyn has described as the 'government' pole within the institution 'law-government'. However, in so far as the roles of SAGE and the Government combine in this context to produce legislative measures and regulations, those roles also tend towards what Llewellyn describes as the 'law' pole within that institution.<sup>79</sup>

The importance of the role of Sage, in particular, as part of the institution of 'law-government' has been recognised by the expression of two concerns. There is concern, first, as to the need to review the transparency and independence of the scientific advice provided by SAGE.<sup>80</sup> Secondly, there is concern as to the potential legal and democratic challenge arising from any

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<sup>74</sup> The legal systems of England and Wales, Northern Ireland and Scotland.

<sup>75</sup> See, in relation to the notions or concepts of 'law-stuff' and 'legal' generally, Llewellyn, 'The Normative, the Legal, and the Law-jobs: The problem of Juristic Method' (1940) 49 *Yale Journal* 1358.

<sup>76</sup> Public Health England, is an executive agency of the Department of Health and Social Care. Its responsibilities of PHE include advising government and supporting action by local government, the NHS in preparing for and responding to public health emergencies – see Public Health England, 'About Us' (GOV.UK, n.d.) <<https://www.gov.uk/government/organisations/public-health-england/about>>. The Government has announced that it will be replaced with a new organisation called the National Institute for Health Protection (NIHP).

<sup>77</sup> The Scientific Advisory Group for Emergencies, whose aims and objectives are to make sure that timely and coordinated scientific advice is made available to decision-makers to support UK cross-government decisions in the Cabinet Office Briefing Office Room (COBR) - see Cabinet Office, *Enhanced SAGE Guidance; A Strategic Framework for the Scientific Advisory Group for Emergencies (SAGE)*, Part Two (London, 2012) para 16. The current group is, at the date of writing chaired by the Government Chief Scientific Adviser, Sir Patrick Vallance, and the Chief Medical Officer, Professor Chris Whitty, and includes experts from within government and leading specialists from the fields of healthcare and academia.

<sup>78</sup> The status of the 'rules' set out in such guidance is often unclear to both the public and officials. The concept of 'social distancing', for example is not mandated by law but is one of the most basic elements of the Government responses to the pandemic.

<sup>79</sup> See Llewellyn, 'Law and the Social Sciences', 196-7.

<sup>80</sup> See N Weinberg and C Pagliari, 'Covid-19 reveals the need to review the transparency and independence of scientific advice' (*UK Constitutional Law Blog*, 15 June 2020) <[ukconstitutionallaw.org/](http://ukconstitutionallaw.org/)>.

claim that the Government is deflecting political responsibility and accountability for the measures imposing lockdown restrictions by claiming that is only 'following the science'.<sup>81</sup>

The degree to which the Government acts upon SAGE's advice may almost inevitably vary at different stages of the pandemic because it also has to weigh in the balance other considerations such as political factors (for example, the economic effects on businesses and employment as well as the effect on different sections of the public at large) in deciding both the timing and nature of any restrictions which are to be imposed.<sup>82</sup> This is unsurprising as some conflict of view or tension may always exist between the separate groups or institutions which together comprise the larger single institution of 'law-government' as a whole.<sup>83</sup> Those individual groups may have different views as to how, in any single instance such as the Covid-19 pandemic, the essential job of producing and maintaining the groupness of the 'Entirety' should be performed. Those views will be based on the specialist skills of the individuals who comprise the separate group performing a particular function within the larger essential job of the single 'law-government' institution as whole. As Llewellyn stated of the institution of law in *The Bramble Bush*, each institution by its very nature tends to possess:

'a type of ethnocentric and chronocentric snobbery – the smugness of your own tribe and own time: *We are the Greeks; all others are barbarians.*'<sup>84</sup>

#### 4.3 The Role of Public Support and Opinion

The essential job of the 'law-government' institution, that of producing and maintaining the groupness of the 'Entirety', requires the overall support of that 'Entirety' – that is to say, the public – in order to do so. Public support will therefore play an important role in promoting that groupness. Divisions and frictions within the 'Entirety' may therefore impair the attempt to achieve that groupness<sup>85</sup> and thus the carrying out of the 'law-job' of 'Net Drive'. That 'law-job' combines the three law-jobs of the adjustment of the 'trouble-case', 'channelling' and the 'Saying' (through legislation and court cases) in promoting the positive direction of achieving the health and balance of the 'Entirety'.<sup>86</sup>

Since any institution comprises a group of individual officials, the behaviour of those individual officials within the sphere of the 'law-government' institution may on occasion also impair both the operation of the 'law-job' of Net Drive and the authority of the institution of which they are part.

In the context of Covid-19, there have been a number of well-publicised instances of such behaviour which have adversely affected public opinion and support for lockdown policies and other restrictions. These include the visit to Durham and Barnard Castle by Dominic Cummings, the Chief advisor to the Prime Minister until his resignation in November 2020,

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<sup>81</sup> See L Trueblood, 'Following the Science', a Legal and Democratic Challenge' (*UK Constitutional Law Blog*, 21<sup>st</sup> Sept 2020) <[ukconstitutionallaw.org/](http://ukconstitutionallaw.org/)>.

<sup>82</sup> See, for example, Andrew Woodcock, 'Coronavirus: Scientific: adviser warns Boris Johnson action to beat the disease must be 'fast and hard'' *The Independent* (London, 16 October 2020, in which it was revealed that SAGE had recommended in September that the country should go into a time-limited 'circuit breaker' lockdown to prevent the resurgence of the outbreak of Covid-19 but that advice was not acted upon by the Government.

<sup>83</sup> See, by way of an example of such potential tension, BBC News, 'Covid: London likely to move to tier 3 amid rising rates' *BBC News* (London, 14 December 2020).

<sup>84</sup> Llewellyn, *The Bramble Bush*, 40-1.

<sup>85</sup> In the UK context of the Covid-19 Pandemic, examples of such division and factions may be found in the anti-lockdown protests in London in December 2020 (see BBC News, 'Covid: More than 150 arrests at London anti-lockdown protest' *BBC News* (London: 28 November 2020) and the party political divisions arising from the grievances of those living in rural areas with a low rate of Covid-19 cases but which have been included in a higher tier of restrictions because of their proximity to cities and towns which have a much higher rate of such cases – see for, example Danielle Sheridan, Gordon Raynor and Laura Donnelly, 'Villagers offered escape routes from toughest tiers' and 'MPs battle to get villages 'decoupled' from hotspots' *Daily Telegraph*, 28 November 2020.

<sup>86</sup> Llewellyn, 'The Normative, the Legal and the Law-Jobs' 1387-95.

during the first period of lockdown;<sup>87</sup> two visits by Dr Catherine Calderwood, the Chief Medical Officer in Scotland, and her family to their second home in breach of Regulation 5 of The Health Protection (Coronavirus) (Protection) (Scotland) Regulations 2020;<sup>88</sup> and the conduct of Margaret Ferrier, the Scottish MP for Rutherglen and West Hamilton, who had previously raised questions in Parliament about Dominic Cummings' visit to Durham. Having displayed Covid-19 symptoms and taken a Covid-19 test, she travelled by train to London in September 2020 while awaiting the test result, and then travelled back by train after speaking in the House of Commons and receiving a positive test result.<sup>89</sup> It has been claimed that the example of Dominic Cummings' Durham visit undermined the public's trust in those restrictions.<sup>90</sup>

## 5. Conclusion

The examples cited in Section 4 demonstrate the applicability of both Llewellyn's 'law-jobs' theory and the single institution of 'law-government' and the phrase 'What officials do ...' to the events of the Covid-19 pandemic in the UK. We therefore argue that they support each of the contentions which we set out in Section 1 as to the jurisprudential significance of the words 'What officials do ...' even in its corrected form in Chapter 5 of *The Bramble Bush* and the Foreword to the second edition of that book.

Those words are relevant to the wider institutional and societal context beyond merely that of the way in which judges decide court cases, the reasons which judges give for making their decisions and the way in which court cases are used as precedents in subsequent cases as Llewellyn described in *The Bramble Bush*. That wider institutional and societal context consists of Llewellyn's wider sociological approach or perspective as embodied on his 'law-jobs' theory and the institution of 'law-government'. In turn, that theory and institution, together with the words 'What officials do ...', provide an extraordinarily useful framework for a jurisprudential evaluation of such events as the Covid-19 pandemic and its widespread social effects.

We have therefore concluded that they remain of continuing relevance and significance in jurisprudence today. They reinforce the need to merge jurisprudential thinking about law, politics, and changing medical and wider scientific advice. As such, we conclude that Llewellyn's institutional analysis from this wider sociological context bears an importance in jurisprudence which is equal to that afforded by any of the Hart-Fuller, Hart-Devlin and Hart-Dworkin debates and should therefore lead to a resurgence of interest in his jurisprudential insights.

This chapter is, we hope, a contribution to the opening-up of the wisdom of Llewellyn as we come towards the centenaries of significant events in his legal thinking. That wisdom, together with the valuable insights to which it gives rise, will, we feel, be of great relevance to lawyers, sociologists and other academics in helping us contribute to advancing the concept or idea of social justice, which forms such an important part of the Open University's Mission Statement.

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<sup>87</sup> See BBC News, 'Cummings drove to Barnard Castle 'to test vision'' *BBC News* (London, 25 May 2020).

<sup>88</sup> See BBC News, 'Coronavirus: Scotland's chief medical officer resigns over lockdown trips' *BBC News* (Edinburgh, 5 April 2020).

<sup>89</sup> See Greg Heffer, 'Coronavirus: MP Margaret Ferrier who travelled with COVID will face no further action from Met Police' (London, 15 October 2020). The Speaker of the House of Commons, Sir Lindsay Hoyle, described his reaction as one of 'complete shock that somebody could be so reckless'.

<sup>90</sup> See Leonie Chao-Fong, 'People are using Dominic Cummings as an excuse to get out of coronavirus fines' *Huffington Post* (UK Edition, 11 November 2020). That post claims that seven appeals against fixed penalty notices served under the Covid-19 regulations between March and October 2020 referred to Cummings by name and cites a YouGov poll following the revelations which showed a fifth of Britons followed lockdown rules less strictly than before with a third citing the adviser's actions as justification for their own breaches of those rules. See also M. Gordon 'Dominic Cummings and the Accountability of Specialist Advisors' (*UK Constitutional Law Blog*, 3rd June 2020) <ukconstitutionallaw.org>.